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FAMILY AND MEDICAL LEAVE ACT OF 1989

APRIL 27, 1989.—Ordered to be printed

Mr. FORD of Michigan, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany H.R. 770 which on February 2, 1989, was referred jointly to the Committee on Education and Labor and the Committee on Post Office and Civil Service]

[Including cost estimate of the Congressional Budget Office]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 770) to entitle employees to family leave in certain cases involving a birth, an adoption, or a serious health condition and to temporary medical leave in certain cases involving a serious health condition, with adequate protection of the employees' employment and benefit rights, and to establish a commission to study ways of providing salary replacement for employees who take any such leave, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment (stated in terms of the page and line numbers of the introduced bill) is as follows:

Page 29, strike line 16 and all that follows through page 37, line 7, and insert the following:

TITLE II—FAMILY LEAVE AND TEMPORARY MEDICAL LEAVE FOR CIVIL SERVICE EMPLOYEES

SEC. 201. FAMILY AND TEMPORARY MEDICAL LEAVE.

(a) IN GENERAL.—(1) Chapter 63 of title 5, United States Code, is amended by adding at the end of the following new subchapter:

H623-3

"SUBCHAPTER V—FAMILY AND TEMPORARY MEDICAL LEAVE

"§ 6381. Definitions

"For purposes of this subchapter—

"(1) 'employee' means—

"(A) an employee as defined by section 6301(2) of this title (excluding an individual employed by the government of the District of Columbia); and

"(B) an individual under clause (v) or (ix) of such section;

whose employment is other than on a temporary or intermittent basis;

"(2) 'serious health condition' means an illness, injury, impairment, or physical or mental condition which involves—

"(A) inpatient care in a hospital, hospice, or residential health care facility; or

"(B) continuing treatment, or continuing supervision, by a health care provider;

"(3) 'child' means an individual who is—

"(A) a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, and

"(B)(i) under 18 years of age, or

"(ii) 18 years of age or older and incapable of self-care because of mental or physical disability; and

"(4) 'parent' means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian.

"§ 6382. Family leave

"(a) Leave under this section shall be granted on the request of an employee if such leave is requested—

"(1) because of the birth of a child of the employee;

"(2) because of the placement for adoption or foster care of a child with the employee; or

"(3) in order to care for the employee's child or parent who has a serious health condition.

"(b) Leave under this section—

"(1) shall be leave without pay;

"(2) may not, in the aggregate, exceed the equivalent of 18 administrative workweeks of the employee during any 24-month period; and

"(3) shall be in addition to any annual leave, sick leave, temporary medical leave, or other leave or compensatory time off otherwise available to the employee.

"(c) An employee may elect to use leave under this section—

"(1) immediately before or after (or otherwise in coordination with) any period of annual leave, or compensatory time off, otherwise available to the employee;

"(2) under a method involving a reduced workday, a reduced workweek, or other alternative work schedule;

"(3) on either a continuing or intermittent basis; or

"(4) any combination thereof.

"(d) Notwithstanding any other provision of this section—

"(1) a request for leave under this section based on the birth of a child may not be granted if, or to the extent that, such leave would be used after the end of the 12-month period beginning on the date of such child's birth; and

"(2) a request for leave under this section based on the placement for adoption or foster care of a child may not be granted if, or to the extent that, such leave would be used after the end of the 12-month period beginning on the date on which such child is so placed.

"(e)(1) In any case in which the necessity for leave under this section is foreseeable based on an expected birth or adoption, the employee shall provide the employing agency with prior notice of such expected birth or adoption in a manner which is reasonable and practicable.

"(2) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee—

"(A) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee's child or parent; and

"(B) shall provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

"§ 6383. Temporary medical leave

"(a) An employee who, because of a serious health condition, becomes unable to perform the functions of such employee's position shall, on request of the employee, be entitled to leave under this section.

"(b) Leave under this section—

"(1) shall be leave without pay;

"(2) shall be available for the duration of the serious health condition of the employee involved, but may not, in the aggregate, exceed the equivalent of 26 administrative workweeks of the employee during any 12-month period; and

"(3) shall be in addition to any annual leave, sick leave, family leave, or other leave or compensatory time off otherwise available to the employee.

"(c) An employee may elect to use leave under this section—

"(1) immediately before or after (or otherwise in coordination with) any period of annual leave, sick

leave, or compensatory time off otherwise available to the employee;

"(2) under a method involving a reduced workday, a reduced workweek, or other alternative work schedule;

"(3) on either a continuing or intermittent basis; or

"(4) any combination thereof.

"(d) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee—

"(1) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the employee's health care provider; and

"(2) shall provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

"§ 6384. Certification

"(a) An employing agency may require that a request for family leave under section 6382(a)(3) or temporary medical leave under section 6383 be supported by certification issued by the health care provider of the employee or of the employee's child or parent, whichever is appropriate. The employee shall provide a copy of such certification to the employing agency.

"(b) Such certification shall be sufficient if it states—

"(1) the date on which the serious health condition commenced;

"(2) the probable duration of the condition;

"(3) the medical facts within the provider's knowledge regarding the condition; and

"(4) for purposes of section 6383, a statement that the employee is unable to perform the functions of the employee's position.

"§ 6385. Job protection

"An employee who uses leave under section 6382 or 6383 of this title is entitled to be restored to the position held by such employee immediately before the commencement of such leave.

"§ 6386. Prohibition of coercion

"(a) An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with such employee's rights under this subchapter.

"(b) For the purpose of this section, 'intimidate, threaten, or coerce' includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).

"§ 6387. Health insurance

"An employee enrolled in a health benefits plan under chapter 89 of this title who is placed in a leave status under section 6382 or 6383 of this title may elect to continue the employee's health benefits enrollment while in such leave status and arrange to pay into the Employees Health Benefits Fund (described in section 8909 of this title), through that individual's employing agency, the appropriate employee contributions.

"§ 6388. Regulations

"The Office of Personnel Management shall prescribe regulations necessary for the Administration of this subchapter. The regulations prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1989.".

(2) The table of contents for chapter 63 of title 5, United States Code, is amended by adding at the end the following:

"SUBCHAPTER V—FAMILY AND TEMPORARY MEDICAL LEAVE

"6381. Definitions.
"6382. Family leave.
"6383. Temporary medical leave.
"6384. Certification.
"6385. Job protection.
"6386. Prohibition of coercion.
"6387. Health insurance.
"6388. Regulations.".

(b) EMPLOYEES PAID FROM NONAPPROPRIATED FUNDS.—Section 2105(c)(1) of title 5, United States Code, is amended by striking "53" and inserting "53, and subchapter V of chapter 63,".

EXPLANATION OF AMENDMENT

The Committee amendment strikes the entirety of title II and inserts a new text. The explanation of the Committee amendment is contained in the explanation of the bill set forth later in this report.

PURPOSE

The purpose of this legislation is to entitle employees to family leave in certain cases involving a birth, adoption, or a serious health condition of a child or parent and to temporary medical leave in certain cases involving a serious health condition of an employee, with adequate protection of the employees' employment and benefit rights.

COMMITTEE ACTION

On February 2, 1989, Representative William Clay (D–Missouri) introduced H.R. 770, a bill to entitle employees to family leave in certain cases involving a birth, an adoption, or a serious health

condition of a child or parent and to temporary medical leave in certain cases involving a serious health condition of the employee, with adequate protection of the employees' employment and benefit rights, and to establish a commission to study ways of providing salary replacement for employees who take any such leave. The bill was referred jointly to the Committee on Post Office and Civil Service and the Committee on Education and Labor. All of the provisions of title II fall within the jurisdiction of the Committee on Post Office and Civil Service. The committee's consideration of the bill was confined to these provisions.

On October 17, 1985, the Subcommittees on Compensation and Employee Benefits and Civil Service of the Committee on Post Office and Civil Service and the Subcommittees on Labor-Management Relations and Labor Standards of the Committee on Education and Labor held a joint hearing on the issue of parental and disability leave (Serial No. 99–36 [hereinafter cited as 1985 House Hearing]).

On March 4, 1986, Representative William Clay introduced H.R. 4300. The bill was jointly referred to the Committee on Post Office and Civil Service and the Committee on Education and Labor.

The Subcommittees on Compensation and Employee Benefits and Civil Service of the Committee on Post Office and Civil Service held a joint hearing on H.R. 4300 on April 10, 1986 (Serial No. 99–56 [hereinafter cited as 1986 House Hearing]).

On June 11, 1986, the Committee on Post Office and Civil Service, by a record vote of 18 to 0 and with a quorum present, ordered H.R. 4300 favorably reported without amendment (H. Rept. 99–699, Part 1). The bill was not considered by the House of Representatives.

On February 3, 1987, Representative Clay introduced H.R. 925, a bill similar to H.R. 4300. On April 2, 1987, the Subcommittees on Compensation and Employee Benefits and Civil Service held a joint hearing on H.R. 925 (Serial No. 100–8 [hereinafter cited as 1987 House Hearing]).

On May 7, 1987, the Subcommittee on Civil Service approved H.R. 925 for full committee consideration, and on May 19, 1987, the Subcommittee on Compensation and Employee Benefits approved the bill for full committee consideration.

On February 3, 1988, the Committee on Post Office and Civil Service ordered H.R. 925, as amended, favorably reported by a voice vote, a quorum being present. The bill was not considered by the House of Representatives.

H.R. 770, as introduced, is identical to H.R. 925. On April 12, 1989, the Committee on Post Office and Civil Service ordered H.R. 770, as amended, favorably reported by a voice vote, a quorum being present.

Summary of Title II of the Bill

Title II of H.R. 770, as amended by the committee, establishes a family and medical leave program specifically for Federal employees. It entitles an employee during any 24-month period, to 18 weeks of job-protected leave without pay upon the birth, adoption, placement for foster care, or serious health condition of a child.

H.R. 770 also entitles a Federal employee to take family leave in connection with a serious health condition of a parent. The bill entitles a Federal employee, during any 12-month period, to take up to 26 weeks of job-protected leave without pay because of the employee's own serious health condition. Both family leave and temporary medical leave are in addition to any annual leave, sick leave, or other leave or compensatory time off otherwise available to the employee. An employee may choose to coordinate family leave or medical leave with any other leave time available. An employee may take the leave under a method involving a reduced workday, a reduced workweek, or some other alternative work schedule. The leave may be taken on a continuing or intermittent basis or any combination of the two. In cases involving the birth or adoption of a child, family leave must be taken within 12 months following the event.

A Federal employee who uses family or medical leave is entitled to be restored to the position held immediately prior to taking family or medical leave. Any interference with an employee's right to take family or medical leave through coercion, intimidation, or threat, is prohibited.

Title II of H.R. 770 includes two provisions to help mimimize any adverse impact on an agency. First, an employee is charged with providing to the agency, when possible, prior notice of the leave to be taken. The employee should attempt to schedule the leave to accommodate the needs of the agency. Second, in cases involving a serious illness of the employee or the employee's child or parent, the agency may require certification of the problem from the health care provider.

Health insurance coverage continues during periods of family leave and medical leave for those employees enrolled in a Federal employees health insurance plan. An employee must make arrangements with the agency to pay the employee's health insurance contribution.

The Office of Personnel Management (OPM) is authorized to prescribe the regulations necesssary for the administration of the family and medical leave provisions.

STATEMENT

HISTORY

In the early 1970's, efforts were made to use Title VII of the Civil Rights Act of 1964 (Pubic Law 88-352) and the equal protection clause of Article XIV of the United States Constitution to remedy discrimination against pregnant women and working mothers and fathers who sought to fulfill parental responsibilities. Setbacks in the U.S. Supreme Court led to passage, in 1978, of the Pregnancy Discrimination Act of 1978 (Public Law 95-555), an amendment to Title VII of the Civil Rights Act of 1964.

The effects of the Pregnancy Discrimination Act have been far-reaching. Employer policies requiring termination and mandatory leave for pregnant employees are now clearly illegal. Pregnant women are entitled to work until childbirth or until medical complications of pregnancy render their continued work attendance medically inadvisable, and they are entitled to return to work on

the same basis as other temporarily disabled workers. Women who become disabled because of pregnancy-related conditions are entitled to paid sick leave, personal leave, disability benefits, medical insurance, and hospitalization on the same basis as other disabled workers. Moreover, Title VII has been interpreted to require that leave for the care of children be granted to fathers on the same basis as an employer grants leave to mothers. *Ackerman* v. *Board of Education of City of New York,* 387 F.Supp. 76 (S.D.N.Y. 1974). [EEOC Compliance Manual Sec. 626.6.]

A 1986 Subcommittee on Civil Service staff study of the parental leave policies of Federal executive branch agencies found that:

> * * * in the absence of a national minimum standard for granting leave for parental purposes, the authority to grant leave and to arrange the length of that leave rests with individual supervisors, leaving Federal employees open to discretionary and possibly unequal treatment. The lack of consistency also leads to differences between how men and women are treaated in the case of maternity and paternity leaves. An individual requesting leave for parental reasons makes a request to his or her supervisor who has broad authority to grant or deny permission for leave and to determine the length of leave. In other words, the lack of clear federal policy on parental leave means that an employee's opportunity for obtaining adequate time off is subject to chance. (Printed in the 1986 House Hearing p. 85.)

In 1987, the General Accounting Office (GAO) testified that, prior to implementing an agency-wide leave policy in 1982—

> * * * an employee would seek unpaid leave for an extended period. It was in considering these requests where we found that managers might apply differing criteria for deciding whether unpaid leave would be approved. (1987 House Hearing p. 10.)

Testifying on the family leave available to Federal employees under current policy, Ms. Eleanor Holmes Norton, Professor at Georgetown Law School, found serious problems with the discretionary nature of family leave:

> We would advise that this constitutes a systemic difference in provision of a job benefit that makes out a prima facie case of violation of Title VII of the 1964 Civil Rights Act. (1987 House Hearing p. 32.)

As important as Title VII and the Pregnancy Discrimination Act have been, they do not address all of the employment related problems of pregnancy and childbirth. Title VII, as amended, is an antidiscrimination law. Its aim is to prohibit employers from treating persons differently on the basis of race, sex, religion, or national origin. Compliance with Title VII requires only that employers treat all employees equally.

Specifically, if an employer grants sick leave and provides disability and health insurance coverage to employees in general, it must, under the Pregnancy Discrimination Act, provide equal cov-

erage to pregnant wage earners who become sick or disabled. If an employer denies benefits to its workforce, it is in full compliance with antidiscrimination laws because it treats all employees equally. Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has required that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an antidiscrimination law by its nature cannot fill. H.R. 770 is designed to fill those gaps.

FAMILY LEAVE (PARENTAL)

In the last half century, the increasing participation of women in the workforce at large has created significant social changes in the United States. In 1970 less than 30 percent of married women with children under two years old were also working outside the home. Recent estimates are that almost 50 percent of these women are working, and the percentage continues to grow. The Bureau of Labor Statistics has estimated that from 1984 to 1990 women will comprise 67.7 percent of those entering the workforce. Women represent the sole parent in 16.6 percent of all families. In addition, in most two-parent families, both parents work. By contrast, the family in which the husband is the sole wage earner and the mother is the homemaker—so long thought to be typical—now constitutes only 7 percent of American households.

In the Federal Government, women made up 34 percent of the workforce in 1973. According to OPM women now make up 42.2 percent of the Federal workforce.

Despite this revolution in the structure of the family, the United States, alone among industrial societies, has no national policy regarding parental leave. For Federal employees, the Federal Personnel Manual (FPM) treats pregnancy like any other medically certified temporary disability. Therefore, sick leave may be used only to cover the time required for physical examinations and to cover the period of incapacitation. Although the needs of a new-born extend beyond the mother's incapacitation, Federal employees who need additional time off must take annual leave or leave without pay.

There is now no guarantee that Federal employees will receive the additional time off they require. Many workers are forced to make difficult choices between the need to provide necessary physical and emotional care for a new child and the need to maintain gainful employment. To promote the stability of the family as a social institution, the Federal Government should ensure that its policies reflect the economic reality in which families exist.

H.R. 770 addresses the need of parents for time off from work obligations when a child is born or brought into a family by providing up to 18 weeks of leave without pay. All Western and Eastern European countries require employers to grant such leaves, as Dr. Sheila Kamerman of Columbia University School of Social Work has documented, and all provide for a period of leave longer than that proposed in H.R. 770.

The amount of time allowed for parental leave—18 weeks, or approximately four months—is primarily based on the period that child development experts suggest as a minum for newborns and new parents to adjust to one another. Dr. T. Berry Brazelton, Asso-

ciate Professor of Pediatrics at Harvard Medical School, recommends four months, explaning that the early months of adjustment to a newborn infant are a crucial opportunity for family bonding. The Advisory Committee on Infant Care Leave of the Yale Bush Center in Child Development and Social Policy recommends leave for a minimum of six months. (1986 House Hearing p. 23.)

Such recommendations apply with equal force to the period necessary for newly adopted children and their families to adjust to one another. In fact some adoption agencies require parents to be home at least three years with an adopted child. In her testimony at the 1985 hearing, Ms. Lorraine Poole, an employee of the City of Philadelphia, described the problems she faced in trying to adopt a child:

> It was normal [adoption] agency procedure for the adoptive parent to leave the workplace for a period of 6 months. This time, it was felt, was very important for both parent and child. * * * This was considered vital with the placement of infants. I had completed all those conditions of the adoptive agency, with one exception, the necessary time away from my place of employment.
>
> I contacted the personnel division of the Philadelphia Recreation Department. The personnel officer listened as I explained what my need was, parental leave for adoption. There was a chuckle. She stated: "You've got to be in the hospital." I thought I had not made my meaning clear. I was not seeking maternity leave, but parental leave for adoption. It was then that I was told the only leave available for parents was maternity leave. * * *
>
> I did submit a request for the use of vacation and personal leave for a period of six months. I was given approval for 2 weeks vacation. (1985 House Hearing p. 4–5.)

Working parents of seriously ill children, including parents working for the Federal Government, face especially difficult problems and require the security of knowing they will get time off when they need it. This was highlighted in the 1986 hearing testimony of Ruth Milam, an employee of the Department of Labor, in which she described her family's experience coping with her daughter Sheila's leukemia:

> We have been lucky enough to each have supervisors who have given us the time off we need * * *
>
> I cannot imagine what we would have done if either of us had been told that we must be at work or we will lose our job. * * *
>
> People should not be forced to make a decision between their work and time with their seriously ill children. The horrible confusion and distress of having a sick child should not be compounded by fear that you'll lose your job. (1986 House Hearing p. 4.)

Ms. Marilyn Young, an employee of the Social Security Administration, described the pull between work and family:

> I don't know if you can fully understand the stress which is created when you have a family member who

> needs your care and your employer tells you no. My child was only two months old, on a heart monitor and oxygen, and had to have constant care.
>
> To have my leave request denied when I had kept my employer constantly informed on my situation, was a serious blow to me. (1987 House Hearing p. 67.)

Leave to care for a seriously ill or injured child is essential to provide that child the security of having a parent there in a time of crisis. If a child must undergo major surgery, the leave may be necessary to encompass the surgery itself and the subsequent recuperation period during which at least one parent must stay home to nurse and care for the child. In testimony prepared for a 1987 hearing before the Senate Labor and Human Resources Subcommittee on Children, Families, Drugs, and Alcohol, Dr. Jerome A. Paulson of the American Academy of Pediatrics explained:

> For over thirty years, it has been well known that children who are hospitalized get well faster and have fewer complications when their parents are able to be with them. A child's physical and emotional well being heavily depend on parental participation during a serious illness.
> * * *

Dr. Paulson went on to describe the difficulty in coming up with a more specific definition of "serious health condition":

> It is also essential that there be flexibility to allow for individual variation that characterizes the unpredictable nature of childhood illness. Examples of factors that affect the prognosis of an injury, illness, or health condition include the age, weight, and medical history and status of the child. The family support system can also impact on the parents' ability to cope with the situation. Even geographical issues such as distance from the hospital can have an influence. The parent whose child is referred to a distant medical center may be in a different situation than the parent whose office is next door to the hospital.

Similarly, if a child's serious health condition requires that the child receive specialized services at school or be placed in a different school setting that provides those services, the parents may need the kind of leave provided by H.R. 770 to make satisfactory arrangements.

Further, for parents of children with disabilities, the choice of keeping them at home or placing them in institutions will often depend on whether the parents are able to keep their jobs yet obtain sufficient leave to provide their children with the support they require. According to Bonnie Milstein of the Consortium of Citizens with Developmental Disabilities:

> The overwhelming majority of families now keep their [disabled] children at home. A major reason for this shift away from institutionalization is that study after study has proved the debilitating effects of institutionalization and its costliness. On the other hand, the individual with disabilities who is allowed to remain in a family environ-

> ment has a much greater likelihood of learning the skills necessary for independence and a fulfilling life in the community.

New parents of healthy children also need time to make appropriate day care arrangements. Given the current problems of availability and affordability of child care, 18 weeks of leave may be required to secure a proper situation.

Providing sufficient parental leave not only benefits employees but also benefits employers by ensuring productivity. According to Catalyst, a New York-based research and consulting firm to major businesses on personnel policies:

> A program that brings employees back to work before they are rested and ready may actually be more deleterious to productivity than allowing an extended leave. The odds are good that leave-takers who return too soon will not be fully productive or will make costly and needless mistakes. * * * When insufficient leave time results in an employee's attrition, the cost of replacing the employee can be substantial.

The 1986 Subcommittee on Civil Service staff study found that some Federal agencies have developed parental leave policy statements. Others have collective bargaining agreements providing specific maternity or parental leave benefits. Yet all 53 Federal agencies responding to the study assign responsibility for the final decision involving maternity, paternity, or adoption leave to the supervisor concerned. (1986 House Hearing pp. 83–102.)

H.R. 770 brings standardization to this very inconsistent approach. It entitles a Federal employee to a maximum of 18 weeks of leave due to the birth, placement for adoption or foster care, or serious illness of the employee's child.

The parental leave provided under H.R. 770 is available to any parent. Thus a father as well as a mother can be granted parental leave so long as the leave is requested to respond to one of the circumstances specified in the statute. The committee recognizes that a special "maternity leave" requirement could be used to deny women job opportunities. Faced with the knowledge that job-protected leaves were required for working mothers and working mothers only, hard-pressed employing agencies would very likely be reluctant to hire or promote women of child-bearing age. However, since employers would be required under H.R. 770 to provide job-protected leave for all employees, they would have little icentive to discriminate against women.

Many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. Increasingly, the people who care for children—and who, therefore, find themselves in need of a workplace accommodation for their childcare responsibilities—are these children's adoptive, step, or foster parents, or their guardians, or sometimes their grandparent or other relative. The legislation deals with such situations by defining the term "child" to mean a biological, adopted, or foster child, stepchild, legal ward, or child of a person standing in loco parentis. This definition ensures that the employees who are enti-

tled to parental leave are the people who have the actual day-to-day responsibility for caring for the child or who have a biological or legal relationship to the child. Thus a Federal employee who lives with, cares for, and acts as parent to the employee's grandchild would be entitled to parental leave should the child need care for a serious health condition. So too, an employee who is divorced from the parent with custody would be able to take parental leave to care for the child.

For an employee to be eligible for parental leave, the child in question must be under 18 years of age unless that child is incapable of self-care because of mental or physical disability. This provision recognizes that some parents may need to take time off work to care for the serious health conditions of their children who have reached legal maturity but are unable to take care of themselves.

On July 8, 1986, the Director of the Office of Personnel Management (OPM), Constance Horner, issued "New Personnel Guidance on Leave for Parental and Family Responsibilities." This guidance does not change existing personnel policy for Federal employees, but it does encourage Federal managers to be flexible in granting family leave. OPM's increased sensitivity to the needs of Federal employees is welcomed, as is the recognition that "responsiveness to family needs works in the long run to the advantage of the organization." Yet, the OPM guidance continues to place responsibility for granting family leave with each individual supervisor, a policy which has too often proved to be arbitrary and unfair.

FAMILY LEAVE (ELDERCARE)

H.R. 770 also allows Federal employees to take unpaid leave when a parent has a serious health condition. Families have traditionally cared for their disabled elderly. But, today, employees are squeezed between work demands and family responsibilities.

A briefing book, prepared for the June 17, 1987 National Conference on "Issues for an Aging America: Employees and Eldercare," cosponsored by the Conference Board, the U.S. Administration on Aging, and the University of Bridgeport, reported that:

> At present there are some 6.6 million dependent elders, that is, persons over the age 65 with some need for assistance from others. The number of such persons will climb rapidly during the remainder of this century and reach some nine million persons by 2000 A.D. and 19 million by 2040 A.D.

This explosion in the number of elderly coupled with the dramatic influx of women--the traditional family caregiver--into the workforce has made "eldercare" a critical work issue. Ms. Eleanor Holmes Norton explained this problem:

> According to a Department of Health and Human Services estimate, 2.2 million people, predominantly women, cared for 1.2 million frail elderly people in 1982. Approximately one million of them were employed for some time during the care-giving experience. And this, of course, is in addition to the more familiar figures for mothers with children who are young.

> Reliance on healthier family members is often the most cost-efficient and desirable way to care for the elderly. But this care cannot be rendered with mirrors. If no accommodation to this need is made on the job, the result will almost surely be an increasing shift of care to high cost professional institutions, much of it at taxpayers' expense. (1987 House Hearing p. 33.)

Dana Friedman of the Conference Board echoes the fact that eldercare is very much a workplace issue:

> The business community is about to feel the effects of a coordinated effort to show why it is in their best interests to help those who care for elderly relatives. Results of Federally funded research will document the problems faced by such employees and substantiate the effects on performance. These data make the case for care of the elderly as a bottom-line business concern, and establish the corporate rationale for involvement. ("Eldercare: The Employee Benefit of the 1990s?" Across the Board, June 1986, p. 45.)

The briefing book for the National Conference on Issues for an Aging America (at p. 4) stresses the need for flexible work policies and cites evidence that the lack of such flexible policies can force caregivers to quit their jobs.

Caring for the elderly creates financial and emotional strains especially on working families. Allowing unpaid family leave to be used in connection with a serious health condition of a parent would greatly alleviate the pressure on the worker and serve to retain quality employees in the workforce.

Parental leave and eldercare together form family leave, a new entitlement in addition to any annual leave, sick leave, temporary medical leave, or other leave or compensatory time off available to an employee. An employee may choose to take family leave in combination with any other available leave. An employee who takes family leave is entitled to be restored to the position held by the employee immediately before taking the leave. The employee may take the 18 weeks of leave either on a continuing or intermittent basis; in the form of a reduced workday, a reduce workweek, or other alternative work schedule; or combination of methods.

The purpose of this leave is to accommodate the employee whose seriously ill or injured child or parent might require periodic hospitalization or treatment. It also allows employees to work part-time to allow for the adjustment of a new child to a family.

TEMPORARY MEDICAL LEAVE

Existing law (5 U.S.C. 6307) entitles Federal employees to sick leave but provides no guarantee of time off for extended periods of illness or injury. Leave without pay may be requested, but it is granted at the discretion of the employing agency. An employee cannot be certain in advance that he or she will receive the needed leave. The Federal Government treats pregnancy like any other medically certified temporary disability. Employees may use available sick leave to cover medical appointments and any period of in-

capacitation. Leave without pay also may be granted at the discretion of the agency.

H.R. 770 would entitle a Federal employee to up to 26 weeks a year of job-protected leave without pay for a serious health condition which renders the employee unable to perform the functions of such employee's position. This temporary medical leave is a new leave entitlement and is in addition to any annual leave, sick leave, family leave, or other leave or compensatory time off available to the employee. The employee may choose to take the temporary medical leave in combination with any other type of leave.

The employee may take the 26 weeks of leave on a schedule designed to accommodate the employee's specific medical problem. The leave can be taken on either a continuing or intermittent basis; in the form of a reduced workday, a reduced workweek, or other alternative work schedule; or through a combination of any such methods. The purpose of this leave is to accommodate all types of illnesses and injuries and to afford an individual the opportunity to return to work.

The test of whether a Federal employee is entitled to temporary medical leave is two-fold: First, is the employee "unable to perform the functions of such employee's position"? And second, is the inability to perform those functions due to a "serious health condition"? This test ensures that there will be no discrimination on the basis of sex.

The two-fold test of inability to work and serious health condition also serves to ensure the availability of leave for serious health conditions. The term "serious health condition" is defined to mean—

> an illness, injury, impairment, or physical or mental condition which involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment, or continuing supervision, by a health care provider.

This definition is intentionally broad to cover various types of physical and mental conditions for which employees may need leave. The definition is intended to cover pregnancy, childbirth, and all attendant conditions.

Under this definition, the illness or condition must involve care or continuing treatment or supervision. The employee need not be an inpatient or undergoing treatment at the time the leave is requested to qualify as having a "serious health condition." Thus, an employee with a heart condition may require leave as a means of temporarily relieving the stress associated with work. Similarly, a pregnant women who is unable to work due to severe morning sickness would quality for leave under this provision even if she need not go to the hospital or the doctor to treat the condition each day.

An employee with a serious health condition may be unable to work simply because of the need to undergo medical treatment. For example, an arthritic employee may need periodic physical therapy; a cancer patient may require chemotherapy treatments. It is in the interest of the Federal Government to accommodate these periods of treatment and provide the employee with the maximum opportunity to return to work for a portion of the day or week.

Under H.R. 770 the agency may require certification of the problem from the health care provider. This provision was added to permit an agency to ensure that this leave program is not misused. For purposes of this legislation, Christian Science practitioners are considered to be health care providers.

IMPACT ON AGENCY

H.R. 770 includes a provision to help minimize the impact of family and medical leave on an employing agency. An employee is required to provide, when possible, prior notice to the agency of the leave to be taken and to make a reasonable effort to schedule the leave so as not to disrupt the operations of the employing agency.

OPM Deputy Director James Colvard acknowledged this provision in his April 2, 1987, hearing testimony but stated that:

> While title II does require an employee who has a foreseeable need to use family or medical leave to make a reasonable effort to inform the agency in advance of this need, it grants the employee a unilateral right to schedule and take the leave. This situation limits the agency's options for dealing with the absence and could result in unfair burdens on co-workers. (1987 Home Hearing, p. 29.)

According to Dr. Colvard, "the essence" of OPM's objection to the bill is that "it abandons any effort to balance the employee's need for leave with the agency's need to get the public's work done." (Ibid., p. 27.) Others disagree.

In her testimony, Ms. Judy Farrell, Project Coordinator of the Economic Policy Council of the United Nations Association, described other instances of job-protected leave within the Federal Government where supervisors continue to manage:

> Managers already deal, on a regular basis, with employees leaving their job either temporarily or permanently. In fact, employers do cope with leaves of absence required for jury service and for military leave for reservists and members of the National Guard. I would just like to quote a statement from a publication of the Office of the Assistant Secretary of Defense, National Committee for Employers, Support of the Guard and Reserve, "Almost all members of the National Guard and Military Reserve units take part in some type of training, whether weekend drills, summer camp or special training. To attend this training, reservists often have to take time off from their jobs, with absences lasting from a few hours to a few months. Federal law protects reservists against being fired or denied certain employment benefits because their military activities interfere with their jobs." (Ibid., pp. 94–95).

Since 1982, the GAO has provided its employees up to 26 weeks of unpaid, job-protected parental leave. Comptroller General Charles A. Bowsher testified that providing this leave did not present an insurmountable managerial problem:

> They [headquarters and regional offices] reported that they have not encountered serious managerial difficulties

> associated with the policy. Professional staff and their assignments can be shifted according to need. Extended absences by clerical and administrative personnel are a bit more complicated to accommodate. But reassigning some tasks, perhaps coupled with compensatory time off for extra hours worked, is usually sufficient to ease a particular situation. (Ibid., p. 13.)

In fact, the committee believes that offering job-protected family and temporary medical leave will enhance the productivity and morale of the Federal workforce and make the Federal Government a more attractive employer. This has been the experience of General Foods Corporation, as Kathleen C. McDonough, Director of Corporate Issues, pointed out in 1985. After explaining that General Foods offers maternity leave, child care leave, parental leave and flexible time, part-time, or job-sharing arrangements, Ms. McDonough concluded that:

> General Foods believes this policy to meet the twin tests of responsiveness to contemporary employees' needs and competitiveness with parental leave plans of other employers. We believe that these policies reflect society as it is and allow us to attract and retain superior employees in the fulfillment of our business objectives. (1985 House Hearing pp. 64–65.)

In addition, the Comptroller General testified in 1987 that:

> While costs are associated with unpaid leave under current procedures, GAO derives some benefits from its parental leave policy, intangible though they may be. The improved morale of our new parents and their good feelings toward the agency are abviously a big plus. * * *
>
> I suspect, but am not in a position to demonstrate, that our policy has also helped us to attract and retain good employees not might otherwise have considered resigning if faced with the competing demands of very early parenthood and an employer insensitive to those demands. (1987 House Hearing p. 14.)

EMPLOYMENT AND BENEFITS PROTECTION

Federal employees who take family or temporary medical leave are entitled to return to the positions they held immediately before taking the leave. This is consistent with existing policy for leave without pay in the Federal Government. (FPM, pp. 630–27.)

The committee believes that allowing employees to return to the same job, rather than an equivalent job, affords an additional degree of protection for employees who take family or temporary medical leave. Returning to the same job will ensure that an employee's career path will not be disurpted and that an employee will not be transferred to a less prestigious assignment as a result of taking extended leave.

There also exists the possibility that an agency manager, feeling pressure to complete certain job assignments, could coerce an employee not to take family or medical leave. Accordingly, an employee is prohibited from intimidating, threatening, or coercing or at-

tempting to intimidate, threaten, or coerce any other employee for the purpose of interfering with the employee's right to job-protected family or medical leave. This includes, but is not limited to, promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation). This prohibition does not include consultations or discussions concerning the scheduling of family or medical leave for the purpose of minimizing the disruption of the operations of the employing agency.

Under the provisions of chapter 12 of title 5, United States Code, the Special Counsel is responsible for investigating certain violations of civil service laws. The committee expects the Special Counsel to pursue aggressively any violation of this Act.

H.R. 770 allows an employee who is enrolled in a health plan under the Federal Employees Health Benefits Program to continue such health insurance coverage during a period of family or medical leave. A payment arrangement would be agreed upon between the agency and the employee to cover the employee's contributions.

OPM is required to prescribe regulations necessary for the administration of the family and medical leave programs. These regulations must be consistent with the regulations prescribed by the Secretary of Labor under Title I of this Act.

Conclusion

H.R. 770 would establish a universal floor below which the Federal Government could not sink in accommodating important family needs of employees. Specifically, the bill would create reasonable periods of time during which the Federal employees could take leave for medical reasons, early child-rearing, and to care for seriously ill children and parents without the risk of termination or retaliation. It thus recognizes the dramatic change in the workforce because of the growing participation of women, especially mothers. Perhaps most importantly, it addresses the needs of the most vulnerable of wage earners, the single woman head of household. It speaks to that crucial intersection between job and home where family needs clash with the demands of the work place. The typical wage-earning woman in the United States will have two children during her years of employment. Over the course of a working lifetime the amount of leave associated with caring for those two infants is small, particularly when the benefits to family and society are weighed in the balance.

Ms. Eleanor Holmes Norton framed this legislation best:

> It is difficult to think of legislation passed in the last 30 years to benefit women that has had a greater impact on the wellbeing of the American family than Title VII of the 1964 Civil Rights Act, it was my great privilege to administer, and other legislation guaranteeing equal employment opportunity for women. Yet none of that legislation was as explicitly for the benefit of the family as the FMLA.
>
> This legislation, as much as any you have had before you, makes clear the inescapable link between benefits for working women and benefits for the entire family.

> The disarray in much of family life in the United States today has proceeded from the economy's demand that women work, coupled with society's failure to accommodate its institutions to this economic reality. (1987 House Hearing, p. 31.)

H.R. 770 should not create a burden for the Federal Government as an employer. In fact, the committee believes that this bill will result in significant benefits to the Government through enhanced worker morale, productivity, and retention of quality employees. In many agencies, employees already receive needed time off for medical problems and for family leave. The bill simply establishes a clear Federal policy that ensures that all employees are treated fairly and equitably.

Section Analysis of Title II

SECTION 201. FAMILY AND TEMPORARY MEDICAL LEAVE

Section 201 amends chapter 63 of title 5, United States Code, by adding a new subchapter V—Family and Temporary Medical Leave—containing the following new sections.

SECTION 6381. DEFINITIONS

Paragraph (1) of section 6381 defines "employee' to mean an "employee" as defined by section 6301(2) of title 5, United States Code, excluding an individual employed by the District of Columbia government. Physicians, dentists, or nurses in the Department of Medicine and Surgery, of the Department of Veterans Affairs, and teachers or individuals holding teaching positions in the Department of Defense Dependent Schools are specifically including in the definition of "employee". Individuals who work on a temporay or intermittent basis are not included.

Paragraph (2) defines "serious health condition" to mean an illness, injury, impairment, or physical or mental condition which involves inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment or continuing supervision by a health care provider.

Paragraph (3) defines "child" to mean a biological, adopted, or foster child, stepchild, legal ward, or child of a person standing in loco parentis, who is under the age of 18 years or, if 18 years or older, is incapable of self-care because of a mental or physical disability.

Paragraph (4) defines "parent" to mean a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian.

SECTION 6382. FAMILY LEAVE

Section 6382 establishes a family leave program for Federal employees. An employee is entitled to request up to 18 weeks of leave without pay because of the birth, adoption, or placement for foster care of that employee's child. In addition, an employee is entitled to request and receive up to 18 weeks of leave without pay to care for that employee's child or parent who has a serious health condition. The family leave may not exceed 18 weeks within any 24-month period and may be taken in addition to any annual leave,

sick leave, temporary medical leave, or other leave or compensatory time off available to the employee. The employee may take the 18 weeks on either a continuing or intermittent basis, through a reduced work week, reduced workday, or other alternative work schedule, or by a combination of such methods. The employee must use any family leave based on the birth or placement for adoption or foster care of a child within 12 months following the event. The employee must make a reasonable effort to schedule the leave so as not to disrupt the operations of the employing agency. The employee is required to provide prior notice to the employing agency when the necessity for family leave is foreseeable.

SECTION 6383. TEMPORARY MEDICAL LEAVE

Section 6383 establishes a temporary medical leave program for Federal employees. An employee is entitled to request up to 26 weeks of leave without pay during any 12-month period if the employee is unable to perform the functions of such employee's position because of a serious health condition. The employee may take the 26 weeks of leave in addition to any annual leave, sich leave, family leave, or other leave or compensatory time off available to the employee. The employee may take the 26 weeks of leave on either a continuing or intermittent basis, through a reduced workweek, reduced work day or other alternative work schedule, or by a combination of any such methods. The employee must make a reasonable effort to schedule the leave so as not to disrupt the operations of the employing agency. The employee is required to provide prior notice to the employing agency when the necessity for temporary medical leave is foreseeable.

SECTION 6384. CERTIFICATION

Section 6384 provides that in cases involving a request for leave based on a serious health condition, the employing agency may require that the request be supported by a certification issued by the health care provider of the employee or of the employee's child or parent. The certification shall include the date of onset of the serious health condition, the probable duration of the condition, the medical facts known to the provider regarding the condition, and in cases when the serious health condition is that of the employee, a statement that the employee is unable to perform the functions of the employee's position.

SECTION 6385. JOB PROTECTION

Section 6385 entitles an employee who takes family or temporary medical leave to be restored to the position held by the employee immediately before taking the leave.

SECTION 6386. PROHIBITION OF COERCION

Subsection (a) of section 6386 prohibits an employee from intimidating, threatening, or coercing, or attempting to intimidate, threaten, or coerce any other employee for the purpose of interfering with the employee's right to job-protected leave. Subsection (b) of section 6386 provides that the term "intimidate, threaten, or coerce" includes promising to confer or conferring any benefit

(such as appointment, promotion, or compensation), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).

SECTION 6387. HEALTH INSURANCE

Section 6387 provides for the continuation of health insurance coverage during family or medical leave. An employee who is enrolled in a health benefits plan under the Federal Employees Health Benefits Program may elect to continue health insurance coverage during a period of family or temporary medical leave and arrange to pay into the Employees Health Benefits Fund the appropriate employee contributions.

SECTION 6388. REGULATIONS

Section 6388 requires the Office of Personnel Management (OPM) to prescribe regulations to administer the provisions of the new subchapter V of chapter 63. The OPM regulations must be consistent with the regulations prescribed by the Secretary of Labor under title I of the Act.

COST

The cost estimate prepared by the Congressional Budget Office pursuant to sections 308(a) and 403 of the Congressional Budget Act of 1974 is set forth below.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 17, 1989.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed Title II of H.R. 770, the Family and Medical Leave Act of 1989, as ordered reported by the House Committee on Post Office and Civil Service, April 12, 1989. CBO estimates that enactment of Title II of H.R. 770 would not result in significant additional costs to the federal government.

Title II of H.R. 770 would allow federal government employees up to 18 weeks of leave without pay during any two-year period, in addition to any other type of leave, for the birth, adoption, or foster care of a child or to care for a sick child or parent. Title II also would entitle an employee to 26 weeks of leave without pay during any 12-month period, when the employee is unable to work because of a serious health condition. In addition, Title II would guarantee job protection and allow for continuation of life and health insurance for employees who take such leave.

Under current law, there is no comprehensive federal policy on parental and medical leave. The Office of Personnel Management provides guidelines for granting leave for various purposes, but implementation of leave policy is up to the discretion of each employee's supervisor.

Based on information from a number of federal agencies, it appears that employees who currently take leave without pay for

purposes encompassed by H.R. 770 generally take it for periods of time shorter than authorized by the bill. Thus, enactment of this bill would result in more leave without pay for affected federal employees, although there is no basis for predicting how much additional leave would be taken. Whether this would increase agencies' costs depends on whether the agencies hire temporary replacements and what salary and benefits are paid. A General Accounting Office study of private firms' practices indicates that, in many cases no temporary replacements are hired. While no comparable information is available regarding federal agencies, we believe that, in aggregate, granting employees leave without pay for extended periods does not result in costs greater than if the employees continued to work—in part because the salaries and benefits of temporary replacements will sometimes be less than those of the permanent employees and in part because sometimes replacements will not be hired. To the extent that agencies have to hire replacement personnal, some additional costs could result from increased recruiting and personnel administration, but we do not expect such costs to be significant.

Enactment of Title II would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CB staff contact is James Hearn, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

OVERSIGHT

Under the rules of the Committee on Post Office and Civil Service, the Subcommittee on Compensation and Employee Benefits is vested with legislative and oversight jurisdiction over the subject matter of this legislation. As a result of its hearings, the subcommittee concluded that there is ample need and justification for enacting this legislation.

The subcommittee received no report of oversight findings or recommendations from the Committee on Government Operations pursuant to clause 4(c)(2) of House Rule X.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of House Rule XI, the committee has concluded that the enactment of H.R. 770 who have no inflationary impact on the national economy.

ADMINISTRATION VIEWS

Set forth below are the views of the Office of Personnel Management, the United States Postal Service, and the Department of Justice, on this legislation.

U.S. OFFICE OF PERSONNEL MANAGEMENT,
OFFICE OF THE DIRECTOR,
Washington, DC, March 20, 1989.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Office of Personnel Management on H.R. 770, the "Family and Medical Leave Act of 1988." The bill would require private employers and State and local governments to provide up to 10 weeks, and the Federal Government up to 18 weeks, of unpaid leave to an employee who chooses to stay home with a newborn, newly adopted, or seriously ill child or a seriously ill parent. It would also require private employers and State and local governments to grant up to 15 weeks, and the Federal Government up to 26 weeks, of unpaid leave for an employee who is temporarily disabled.

As single parents and parents with working spouses increasingly enter the Nation's work force, the difficulties of balancing career, childbirth, and myriad other family and job responsibilities are confronting a growing number of Federal employees. The Federal Government has a generous leave system which is generally able to meet employees' family and medical needs, including childbirth. Managers are encouraged to accommodate the needs of individual workers in a flexible manner.

Employees accrue sick leave at the rate of four hours every two weeks, or 13 days a year, and agencies may advance up to 30 days of sick leave to an employee with a serious disability or ailment. Employees may use sick leave for incapacitation due to childbirth. Federal employees accrue annual leave at the rates of 13, 20, or 26 days a year, depending on the length of their Federal service. Sick leave accumulates without limit during an employee's Federal career. In most cases, an employee can accumulate annual leave and carry up to 30 days from one year to the next.

Leave without pay may be requested and granted, not merely for 18 weeks, or even 26 weeks, but in amounts limited only by the employing agency's discretion. Employees who feel that leave has been denied them unfairly may appeal administratively, or if they are covered by a bargained agreement, may file a grievance.

Federal employees enjoy firm job protection whenever they are on approved leave, whether paid or unpaid. When employees are on leave, they (and their covered dependents) continue to be eligible for health and life insurance benefits.

In 1986, the Office of Personnel Management undertook a review of leave options available to employees with ill children, childbirth, emergency medical, and other problems. Following our review, OPM issued Federal Personnel Manual guidelines for Leave for Parents and Family Responsibilities, and for Leave Without Pay, urging agencies and managers to be flexible and compassionate in meeting employees' needs for leave, and yet preserve managers' ability to pursue agency functions.

OPM's central objection to H.R. 770 is that it abandons any attempt to balance the employee's need for leave with the manager's

and agency's need to accomplish the agency's work. Despite language that obligates employees to consult with supervisors when advance notice is possible, the bill leaves total discretion for taking this leave with the employee.

Title II of H.R. 770 would impose on the Federal Government family and medical leave requirements similar to those required of private, State, and local employers under Title I. However, significant differences exist between the two titles that would have the effect of imposing on Federal managers an even more onerous restriction on management flexibility than would be imposed on private, State, and local managers.

First, the amounts of family and medical leave that a Federal employee could take, regardless of the needs of the agency, would be nearly double the amounts that would be provided for private, State, and local employees, notwithstanding the fact that Federal employees are already entitled to annual and sick leave under a leave program that is substantially more generous than that of most other employers.

The second significant difference between Titles I and II concerns the treatment of an employee who returns from the leave provided in the bill. For employees covered under Title I, the bill provides entitlement to be restored to the same position, or "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." Title II, on the other hand, provides that an employee is "entitled to be restored to the position held by such employee immediately before the commencement of such leave." While restoration to the same job usually occurs under the current Federal system, there would be cases where this restoration guarantee would hinder an agency's ability to perform its mission. For example, an employee in an specialized position might take frequent or intermittent leave over a long period of time, as permitted by H.R. 770. Yet the agency would be able to fill in behind the employee only on a temporary basis, regardless of the amount of training required for substitute employees. Further, it should be noted that restoration to the same job is a right not guaranteed to other employees returning from extended leave, such as veterans returning from military service.

However, even if these inconsistencies between Titles I and II were resolved, OPM would still object to this legislation, since it would be an unnecessary and burdensome intrusion into Federal managers' ability to manage the operations for which they are responsible.

With respect to the provisions of H.R. 770 dealing with the private sector, the Administration believes the bill would be a counterproductive intrusion into the labor market and into the rights and responsibilities of private sector employers. Private sector employers and employees, in labor market competition or in union negotiations, should be free to consider these benefits in relation to other compensation options. Nor do we believe it is necessary to create a Commission to study existing and proposed leave policies and their effect on small businesses. A new Commission would intrude further into the labor market by creating pressure for the expansion of the leave benefits mandated by the bill.

President Bush has made clear his commitment to helping the working family cope with the burdens of child care. As increasing numbers of single parents and parents with working spouses take up Federal careers, we are very much aware that it is in the Federal Government's interest to address the demands made on working parents. Although we believe that OPM's guidance is responsive to employees' family and urgent medical needs, while still preserving Federal managers' ability to accomplish their jobs, the Bush Administration will continue to review this matter as well as a number of other family-related matters.

Therefore, the Administration is strongly opposed to enactment of H.R. 770. The Office of Management and Budget advises that there is no objection to the submission of this report, and that enactment of H.R. 770 would not be in accord with the program of the President.

Sincerely,

CONSTANCE HORNER,
Director.

U.S. POSTAL SERVICE,
LAW DEPARTMENT,
Washington, DC, March 20, 1989.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for the views of the Postal Service on H.R. 770, the proposed "Family and Medical Leave Act of 1989." Our comments are limited to Title I of the bill since those provisions, as opposed to the civil service requirements set forth in Title II, would apply to the Postal Service.

This legislation proposes to create a new statutory right for certain employees to take leave for reasons related to the birth or adoption of a child, or certain health problems of the employee, the employee's children or parents.[1] In our opinion, the enactment of this type of statutory entitlement would aggravate what is already one of the greatest employee-related operational problems confronting employers: namely, anticipating varying workloads and ensuring that the right number of employees are scheduled each day and, in fact, report to work.

Under the proposed family leave provisions, an individual would seemingly be guaranteed the right to be absent from work on an intermittent and unscheduled basis for reasons related to the health problems of family members. Unscheduled absences by employees due to personal illness, last-minute personal circumstances, or simply no reason at all, can cause substantial problems in an organization like the Postal Service where the basic operation of processing and delivering the mail does not lend itself to postponing work until a more "convenient" time is found for it to be performed. When an employee does not report as scheduled, someone

[1] As introduced, H.R. 770 would grant eligible employees up to 10 workweeks of family leave during any 24-month period, and up to 15 workweeks of temporary medical leave for "serious health conditions" during any 12-month period.

else with the requisite skills to get the job done must be found at the last minute, often by calling an individual into work on his or her day off. If a replacement cannot be found, the workday may have to be extended for other employees who must do their own jobs as well as the work of the absent employee. Creating a right to be absent, often in last-minute circumstances, would allow absent employees to burden other employees and would place a substantial constraint on the Postal Service's ability to meet its operational requirements.

Closely related to the operational difficulties this legislation would create are the likely financial consequences of its passage. Stated simply, the labor costs associated with moving the nation's mail would undoubtedly increase. Unexpected and extended absences of experienced postal workers would require the hiring of additional personnel, and consequently the costs associated with employee benefits could be expected to rise. To ensure the availability of a sufficient number of qualified replacements to fill in for absent employees, a greater investment in employee training would likely be required as well. In addition, salary costs would increase since many of the absences the bill would authorize, particularly those taken on an intermittent and unscheduled basis, would have to be covered by employees paid at overtime rates.

We are also concerned that the procedural aspects of the bill would pose serious problems of potential abuse and expensive litigation. Entitlement to the proposed benefits involves certain standards which would require an employer to exercise judgment in approving or disapproving a leave request in some circumtances. For example, the temporary medical leave would be available only if a medical condition renders an employee "unable to perform the functions of such employee's position."

Inasmuch as entitlement to the proposed benefits may not be clear-cut in many cases, we are concerned that the civil enforcement provisions of the bill could invite unnecessary and expensive litigation. Proposed section 107(a), for example, would make it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise," any right established by the bill. This provision could subject the employer to the risk of litigation and potential penalties should it seek to deny a leave request which it believes may not be justified. We believe that employers require the right to assure that leave benefits are exercised properly and to discipline employees for leave abuse.

The bill generally would grant an employee who believes his rights under the legislation have been violated the option of seeking administrative enforcement through the Secretary of Labor or of seeking immediate relief in Federal or State court. Allowing an individual to go directly to court would likely lessen the aggrieved individual's incentive to attempt to resolve a problem administratively. This, in turn, would deprive the employer of the opportunity to investigate and resolve the matter before incurring the costs associated with litigation.

In our opinion, it would be inappropriate to apply the dual enforcement scheme, which is taken from the Fair Labor Standards Act, to the administration of an employee leave benefit program. It would lead to substantial additional costly litigation and add to the

already heavily burdened dockets of the Federal courts. Simpler procedures for enforcing other labor laws, such as those of the National Labor Relations Board, 29 U.S.C. § 160, still afford full protection of employee rights while minimizing the possibility of abuse.

Finally, we are concerned that insofar as it would appear to create employee rights in the areas of leave, seniority, job ownership and placement, the bill addresses areas which are clearly subjects for collective bargaining under the National Labor Relations Act. In some situations, H.R. 770 would negate the provisions of existing collective bargaining agreements entered into in good faith by employers and unions, and create new rights not bargained for. This would disrupt the balance already struck in collective bargaining agreements by imposing altered working conditions on parties who had reached agreement through the negotiating process. The creation of a dispute resolution process in the Department of Labor and the courts outside the collective bargaining relationship would seem to further undercut that relationship.

For the reasons stated, the Postal Service recommends against enactment of the legislation.

Sincerely,

FRED EGGLESTON,
Assistant General Counsel,
Legislative Division.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, April 19, 1989.

Hon. WILLIAM D. FORD,
Chairman, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter is to inform you that the Department of Justice opposes the enactment of H.R. 770, "The Family and Medical Leave Act of 1989." This bill, which would establish a uniform, national policy compelling employers to provide up to 10 weeks' parental leave in any 24-month period or 15 weeks' medical leave in any 12-month period to employees on the birth, adoption, or placement for foster care of a son or daughter, or upon the serious illness or injury of themselves, their sons or daughters, violates two policies of this Administration: (1) generally relying on private initiative and negotiations among employers and employees to set the terms and conditions of employment; and (2) in the absence of a compelling need for national uniformity, relying on state rather than federal regulation. Because of our strong commitment to these policies, the Justice Department will recommend to the President that he veto this bill if it is passed by the Congress.

We understand the laudable goals of this bill—to enable employees to attend to family needs and at the same time continue with their jobs and careers—but we think that mandatory federal legislation is an inappropriate way to achieve them. H.R. 770 is fundamentally at odds with historic practice and would preempt private employment agreements and state health and welfare regulations.

It is also fundamentally inconsistent with this Administration's stated philosophies and policies.

The Constitution establishes a national government of limited powers, expressly providing in the tenth amendment that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." However, even when Congress has the constitutional authority to act, in many cases there are sound policy reasons for Congress to defer to the states. This notion is based on the belief that the states, and not the federal government, are in the best position to respond to the perceived needs and desires of their citizens. Where there is no compelling need for national uniformity, states should be free to devise their own programs, tailored to their citizens' needs. Not only can they learn from each others' successes and failures, the states can take into account regional differences that a uniform, national program might overlook. On occasion, attempts by the states to find solutions can reveal a genuine need for a national solution: in that event, state experience frequently serves as a valuable guide to national lawmakers.[1]

But to unilaterally impose a national solution to an issue already being addressed by private employers, labor organizations, and the states is to put the cart before the horse. Health, safety and welfare regulation traditionally has been the responsibility of the states. They uniquely possess the resources and competence to discern the conditions, needs and desires of their citizens on these issues, and the expertise to enact laws to address those concerns.

The Department of Justice opposes enactment of H.R. 770 because the bill mandates federal intrusion into the relationship between employer and employee—a matter best left to the private sector, to collective bargaining and individual choice. But if it appears, in the judgment of state legislatures, that some regulation is desirable, the matter should generally be left to the states. Given the difficulty of divining the costs and benefits, and determining the appropriate levels of such leave policies, allowing the states to serve as laboratories and to experiment with a variety of approaches to the perceived problems is preferable to imposing national regulation. At least seventeen states—including California,[2] Tennessee, Louisiana, Oregon, Minnesota, Connecticut, and Rhode Island—already are experimenting with such laws, and their experience will be instructuve to others.[3] The Department of Justice sees no compelling need for a national rule on this subject.

More specifically, section 102 of H.R. 770 defines "employee" as any person who has been employed by the employer for at least 900 hours of service during the past 12 months, and for at least 12 months. Based on a 52-week working year (12 months), H.R. 770

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[1] For example, had it not been for the experience of each of the thrirteen original colonies in grappling with the establishment of state governments, those who gathered in Philadelphia in the summer of 1787 to draft our national charter surely would not have so successfully discharged their task.

[2] California's law recently was upheld by the Supreme Court in *California Federal Savings & Loan* v. *Guerra*, 107 S. Ct. 683 (January 13, 1987).

[3] See M. Brannigan, Laws on Parental-Leave Benefits Draw Opposition from Employers, Wall St. J., Oct. 12, 1987, p. 20.

would entitle employees who worked only 17.3 hours each week to invoke the entitlement of this Act.

An "employer" is defined in H.R. 770 as anyone who employs 50 or more employees at any one worksite for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and also includes any public agency. Thus, the bill could have very adverse effects on small business.

Section 103 of H.R. 770 outlines the parental leave requirement. An employee would be entitled to 10 workweeks of parental leave during any 24-month period as the result of the birth or placement for adoption or foster care of a child, or to care for a child with a serious health condition. Medical leave could be taken intermittently. Leave may be unpaid, except for the following situation: if an employer already provides paid parental leave for fewer than 10 workweeks, the balance may be unpaid leave, but either the employee or the employer may elect to substitute accrued paid vacation leave, personal leave, or other paid leave for any part of the 10-week period. The bill contains certain requirements for giving notice where the need for leave can be foreseen, so as not to disrupt unduly the employer's operations.

For non-federal employees, spouses employed by the same employer are entitled to an aggregate of 10 workweeks for parental leave during any 24-month period under Title I of H.R. 770. Presumably, an unmarried couple not "husband and wife" within the definition in Section 103 would qualify for 10 weeks' leave apiece, since "son or daughter" is defined in Section 102 without respect to the marital status of the parents. We assume that this anomalous preference for unmarried parents over married parents is unintended.

Section 104 of H.R. 770 provides that "[a]ny employee who, as the result of a serious health condition, becomes unable to perform the functions of the position of the employee" shall be entitled to temporary medical leave, not to exceed 15 workweeks during any 12-month period. This section does not distinguish between illness or injury which may be considered permanent as opposed to temporary. This Department has a fundamental objection to the unilateral imposition of a national rule in an area better left to individual choice or collective bargaining negotiations.

Section 107 of H.R. 770 provides for enforcement of this legislation by the Secretary of Labor. Interference by any employer with the rights conferred by this bill is prohibited. Section 108 charges the Secretary of Labor to issue rules and regulations concerning service of complaints, notice of hearings, and other proceedings related to complaints brought under this Act. The United States Department of Labor is charged with enforcement and required to establish a comprehensive bureaucracy to handle investigations and process complaints. Administrative hearings are provided for, and settlement agreements authorized, but if the Secretary does not act in a timely fashion the charging party may bring a civil action in federal court.

Section 109 of the bill authorizes enforcement of its provisons by civil action. This section of the bill is problematical in several respects. First, subsection 109(a)(2) allows aggrieved employees to seek relief in court without exhausting administrative remedies.

The lack of an exhaustion requirement lessens the possibility of informal dispute resolution and would add to the congestion of federal court dockets. Futhermore, an administrative procedure might be largely ignored if not made mandatory.

A second problem with the bill's civil enforcement provisions is its grant to the Secretary of Labor of authority to appoint attorneys to appear for and represent the Secretary in all courts other than the Supreme Court. Section 109(d). A grant of independent litigating authority to a department other than the Department of Justice would be contrary to the longstanding policy that, other than in limited and exceptional circumstances, the conduct of litigation in which the United States or its agencies is a party "is reserved to the officers of the Department of Justice under the direction of the Attorney General." 28 U.S.C. 516. There appears to be no reason to consider this to be an exceptional circumstance. More particularly, this approach is dissimilar to well established procedure such as that under the Fair Labor Standards Act (FLSA) by which litigation involving the United States is under the direction and control of the Justice Department. The FLSA approach avoids the risk of the Government appearing to take inconsistent positions.

Finally, section 109(a) gives the right to bring a civil action to "an eligible employee or any person, including a class or organization on behalf of any eligible employee." Just how broad a concept of standing is contemplated by this language is not clear. It could, for example, be read as being broader than constitutional and prudential restrictions on the standing of plaintiffs to sue in federal court would allow. See, *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Also, the subsection's use of the term "class" tends to confuse the representational standing granted by this section of the bill with concepts of class action litigation under Rule 23 of the Federal Rules of Civil Procedure.[4]

Section 111 outlines the relief which may be granted if a violation is found. Relief may range from a cease and desist order or an injunction to monetary damages in the amount of wrongfully denied wages or benefits, plus interest, plus either the same amount as liquidated damages or consequential damages not to exceed three times the amount of actual damages determined. A prevailing party other than the United States is entitled to reasonable attorneys' fees in addition to any other amount awarded. Clearly, statutes that provide for double, or even triple, damages could be potentially very expensive for employers, and could tend to encourage litigation. Experience with the antitrust laws suggests that the prospect of multiple damages frequently leads businesses to settle cases in which liability is dubious at best, rather than risk a court award of several times the amount of actual damages.

H.R. 770 would require the establishment of even more onerous parental and medical leave entitlements for civil service employees. However, in many respects, procedures currently in place for

[4] In class action litigation, a named class representative litigates a claim on behalf of a large class of members, while this bill contemplates having a group or organization bring suit on behalf of a named individual.

civil service employees are more flexible than those that would be imposed by H.R. 770. Civil service employees accrue sick leave at the rate of four hours every two weeks, or 13 days a year, and agencies may advance up to 30 days of sick leave to an employee with a serious disability or ailment. Employees may use sick leave for incapacitation due to childbirth. Civil service employees also accrue annual leave at the rates of 13, 20, or 26 days a year, depending on the length of their Federal service. Sick leave accumulates without limit during an employee's Federal career. In most cases, an employee can accumulate annual leave and carry up to 30 days from one year to the next.

Leave without pay may be requested and granted in amounts limited only by the employing agency's discretion. Employees who feel that leave has been denied them unfairly may appeal administratively, or if they are covered by a bargained agreement, may file a grievance. Civil service employees also enjoy firm job protection whenever they are on approved leave, whether paid or unpaid. In addition, employees (and their covered dependents) continue to be eligible for health and life insurance benefits. The Office of Personnel Management has urged Federal agencies to show flexibility and accommodation in granting leave to both natural and adoptive parents.

H.R. 770 would also establish a Commission on Family and Medical Leave to conduct a comprehensive study of existing and proposed policies relating to parental and medical leave, and their effect on small businesses. Many private-sector employers are alarmed at the potential cost of being required to provide unpaid parental and medical leave. A new Commission is not needed, and would intrude further into the labor market by creating pressure for the expansion of the leave benefits mandated by the bill.

CONCLUSION

To conclude, H.R. 770 is simply irreconcilable with this Administration's philosophical views and goals. The Department of Justice can see no compelling need for uniform federal regulation of employee leave policies. We believe that the burden should rest on those who support such a departure from past practice to articulate some principled reason for the federal government to intervene in an area historically reserved to private agreements between employers and employees, collective bargaining agreements, and the states. If this bill is passed, the Department of Justice will recommend to the President that it be vetoed.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report to the Congress and enactment of H.R. 770 or any mandated leave legislation would not be in accord with the program of the President.

Sincerely,

CAROL T. CRAWFORD,
Acting Assistant Attorney General.

CHANGES IN EXISTING LAW MADE BY THIE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

PART I—THE AGENCIES GENERALLY

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Subpart A—General Provisions

CHAPTER 21—DEFINITIONS

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§ 2105. Employee

(a) * * *

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(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—

(1) laws (other than subchapter IV of chapter [53] *53, and subchapter V of chapter 63,* of this title, subchapter III of chapter 83 of this title to the extent provided in section 8332(b)(16) of this title, and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

(2) subchapter I of chapter 81, chapter 84, and section 7902 of this title.

This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

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Subpart E—Attendance and Leave

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CHAPTER 63—LEAVE

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SUBCHAPTER V—FAMILY AND TEMPORARY MEDICAL LEAVE

6381. Definitions.
6382. Family leave.
6383. Temporary medical leave.

6384. Certification.
6385. Job protection.
6386. Prohibition of coercion.
6387. Health insurance.
6388. Regulations.

Subchapter V—Family and Temporary Medical Leave

§ 6381. Definitions

For purposes of this subchapter—

(1) "employee" means—

(A) an employee as defined by section 6301(2) of this title (excluding an individual employed by the government of the District of Columbia); and

(B) an individual under clause (v) or (ix) of such section; whose employment is other than on a temporary or intermittent basis;

(2) "serious health condition" means an illness, injury, impairment, or physical or mental condition which involves—

(A) inpatient care in a hospital, hospice, or residential health care facility; or

(B) continuing treatment, or continuing supervision, by a health care provider;

(3) "child" means an individual who is—

(A) a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, and

(B)(i) under 18 years of age, or

(ii) 18 years of age or older and incapable of self-care because of mental or physical disability; and

(4) "parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, or a legal guardian.

§ 6382. Family leave

(a) Leave under this section shall be granted on the request of an employee if such leave is requested—

(1) because of the birth of a child of the employee;

(2) because of the placement for adoption or foster care of a child with the employee; or

(3) in order to care for the employee's child or parent who has a serious health condition.

(b) Leave under this section—

(1) shall be leave without pay;

(2) may not, in the aggregate, exceed the equivalent of 18 administrative workweeks of the employee during any 24-month period; and

(3) shall be in addition to any annual leave, sick leave, temporary medical leave, or other leave or compensatory time off otherwise available to the employee.

(c) An employee may elect to use leave under this section—

(1) immediately before or after (or otherwise in coordination with) any period of annual leave, or compensatory time off, otherwise available to the employee;

(2) under a method involving a reduced workday, a reduced workweek, or other alternative work schedule;

(3) on either a continuing or intermittent basis; or

(4) any combination thereof.

(d) Notwithstanding any other provision of this section—

(1) a request for leave under this section based on the birth of a child may not be granted if, or to the extent that, such leave would be used after the end of the 12-month period beginning on the date of such child's birth; and

(2) a request for leave under this section based on the placement for adoption or foster care of a child may not be granted if, or to the extent that, such leave would be used after the end of the 12-month period beginning on the date on which such child is so placed.

(e)(1) In any case in which the necessity for leave under this section is foreseeable based on an expected birth or adoption, the employee shall provide the employing agency with prior notice of such expected birth or adoption in a manner which is reasonable and practicable.

(2) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee—

(A) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of the employee's child or parent; and

(B) shall provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

§ 6383. Temporary medical leave

(a) An employee who, because of a serious health condition, becomes unable to perform the functions of such employee's position shall, on request of the employee, be entitled to leave under this section.

(b) Leave under this section—

(1) shall be leave without pay;

(2) shall be available for the duration of the serious health condition of the employee involved, but may not, in the aggregate, exceed the equivalent of 26 administrative workweeks of the employee during any 12-month period; and

(3) shall be in addition to any annual leave, sick leave, family leave, or other leave or compensatory time off otherwise available to the employee.

(c) An employee may elect to use leave under this section—

(1) immediately before or after (or otherwise in coordination with) any period of annual leave, sick leave, or compensatory time off otherwise available to the employee;

(2) under a method involving a reduced workday, a reduced workweek, or other alternative work schedule;

(3) on either a continuing or intermittent basis; or

(4) any combination thereof.

(d) In any case in which the necessity for leave under this section is foreseeable based on planned medical treatment or supervision, the employee—

(1) shall make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the operations of the employing agency, subject to the approval of the employee's health care provider; and

(2) shall provide the employing agency with prior notice of the treatment or supervision in a manner which is reasonable and practicable.

§ 6384. Certification

(a) An employing agency may require that a request for family leave under section 6382(a)(3) or temporary medical leave under section 6383 be supported by certification issued by the health care provider of the employee or of the employee's child or parent, whichever is appropriate. The employee shall provide a copy of such certification to the employing agency.

(b) Such certification shall be sufficient if it states—

(1) the date on which the serious health condition commenced;.

(2) the probable duration of the condition;

(3) the medical facts within the provider's knowledge regarding the condition; and

(4) for purposes of section 6383, a statement that the employee is unable to perform the functions of the employee's position.

§ 6385. Job protection

An employee who uses leave under section 6382 or 6383 of this title is entitled to be restored to the position held by such employee immediately before the commencement of such leave.

§ 6386. Prohibition of coercion

(a) An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with such employee's rights under this subchapter.

(b) For the purpose of this section, "intimidate, threaten, or coerce" includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).

§ 6387. Health insurance

An employee enrolled in a health benefits plan under chapter 89 of this title who is placed in a leave status under section 6382 or 6383 of this title may elect to continue the employee's health benefits enrollment while in such leave status and arrange to pay into the Employees Health Benefits Fund (described in section 8909 of this title), through that individual's employing agency, the appropriate employee contributions.

§ 6388. Regulations

The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1989.

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